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The ICTY Appellate Chamber's Acquittal of Momcilo Perisic: The Specific Direction Element of Aiding and Abetting Should Be Rejected or Modified to Explicitly Include a "Reasonable Person" Due Diligence Standard

Jennifer Trahan

Erin K. Lovall

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THE ICTY APPELLATE CHAMBER'S ACQUITTAL OF MOMČILO PERIŠIĆ: THE SPECIFIC DIRECTION ELEMENT OF AIDING AND ABETTING SHOULD BE REJECTED OR MODIFIED TO EXPLICITLY INCLUDE A “REASONABLE PERSON” DUE DILIGENCE STANDARD

Jennifer Trahan & Erin K. Lovall†*

INTRODUCTION.....	172
I. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR AIDING AND ABETTING UNDER INTERNATIONAL LAW PRIOR TO THE FORMATION OF THE ICTY.....	174
II. ICTY'S CASE LAW REGARDING AIDING AND ABETTING	177
A. <i>The Duško Tadić Case</i>	178
B. <i>The Furundžija Case</i>	181
C. <i>Other Relevant ICTY Cases</i>	182
III. THE MOMČILO PERIŠIĆ CASE.....	185
A. <i>The Perišić Indictment</i>	186

* Associate Clinical Professor of Global Affairs, N.Y.U.-S.P.S. Professor Trahan has written widely on issues of international criminal justice, including two books on the case law of the *ad hoc* tribunals, *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the former Yugoslavia* (Human Rights Watch 2006); *Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda* (Human Rights Watch 2010).

† Recent graduate of New York University's Master's Program in Global Affairs. Prior to joining NYU's program, Ms. Lovall worked as a corporate bankruptcy attorney in Dallas, Texas. The author would like to thank Professor Trahan for collaborating on this article. Both authors would like to express their deep appreciation for the helpful comments provided by Matthew Gillett and Bogdan Ivanisevic regarding this article.

<i>B. The Perišić Trial Chamber Judgment and Opinion Related to Aiding and Abetting</i>	187
<i>C. Judge Moloto's Dissent Related to Aiding and Abetting</i>	189
<i>D. The Perišić Appeals Chamber Judgment Related to Aiding and Abetting</i>	190
<i>E. Judge Liu's Partial Dissent Regarding Aiding and Abetting</i>	194
IV. THE <i>PERIŠIĆ</i> APPEALS CHAMBER'S INTERPRETATION OF "SPECIFIC DIRECTION" IS OVERLY STRINGENT AND HAS BEEN REJECTED BY SUBSEQUENT ICTY AND SPECIAL COURT FOR SIERRA LEONE APPEALS CHAMBER DECISIONS	196
<i>A. The Perišić Appeals Chamber's Interpretation of "Specific Direction" Is So Stringent That It Potentially Eviscerates Aiding and Abetting Under International Criminal Law ..</i>	196
<i>B. Appellate Chambers That Have Considered the Standard for Aiding and Abetting After Perišić Have Rejected "Specific Direction" as an Element</i>	198
1. The <i>Charles Taylor</i> Case	198
2. The <i>Šainović, et al.</i> Case	200
V. THE ELEMENT OF SPECIFIC DIRECTION SHOULD EITHER BE REJECTED OR MODIFIED TO EXPLICITLY INCLUDE A "REASONABLE PERSON" STANDARD	202
<i>A. The Arguments for Rejecting "Specific Direction" as an Element of Aiding and Abetting</i>	202
<i>B. The Arguments for Incorporating a "Reasonable Person" Standard into Aiding and Abetting</i>	204
CONCLUSION	206

INTRODUCTION

In the 1990s, the former Yugoslavia plunged into chaos as various segments of the nation declared independence, while the government in Belgrade sought to maintain control of

the region. Nationalist politicians inflamed age-old ethnic tensions, resulting in horrific war crimes, ethnic cleansing, crimes against humanity, and the worst genocide to occur in Europe since the Second World War. As a result of the conflict, the United Nations Security Council (“UNSC”) created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (the “ICTY”).¹ The ICTY was given jurisdiction to prosecute genocide, war crimes, and crimes against humanity that were committed in the former Yugoslavia. Since its creation, the ICTY has been the standard-bearer for modern international criminal tribunals.

One of the individuals tried by the ICTY was Momčilo Perišić (“Perišić”), the former Chief of the Yugoslav Army General Staff.² At trial, Perišić was convicted on twelve of the thirteen counts with which he was charged, and sentenced to twenty-seven years’ imprisonment.³ Over half of the counts against Perišić alleged that he had aided and abetted the Army of the Republic of Srpska (the “VRS”)—specifically, that he had provided substantial aid to the VRS, knowing that such aid would facilitate the VRS’s ability to commit war crimes and crimes against humanity.⁴ On appeal, the Trial Chamber’s decision was reversed and Perišić was completely acquitted.⁵ The *Perišić* Appeals Chamber held, among other things, that the Trial Chamber improperly ignored the issue of whether Perišić’s actions were “specifically directed” toward facilitating the VRS’s crimes and that, without proof of specific direction, Perišić could not be found guilty of aiding and abetting the VRS.⁶

¹ S.C. Res. 827, para. 2, U.N. Doc. S/RES/827 (May 25, 1993); see also Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFFAIRS No. 3, 122–35 (Summer 1993).

² Prosecutor v. Perišić, Case No. IT-04-81, Trial Chamber Judgment, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) [hereinafter Perišić TC Judgment]; Prosecutor v. Perišić, Case No. IT-04-81, Trial Chamber Judgment Summary, p. 1 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) [hereinafter Perišić TC Judgment Summary].

³ Perišić TC Judgment, *supra* note 4, ¶¶ 1836, 1838.

⁴ *Id.* ¶¶ 1627, 1631.

⁵ Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Chamber Judgment, ¶¶ 120, 122 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) [hereinafter Perišić Appeals Judgment].

⁶ *Id.* ¶ 58.

This Article traces the development of international criminal law with respect to aiding and abetting responsibility and concludes that the “specific direction” standard, as set forth by the Appeals Chamber in *Perišić*, should either be rejected outright or modified to explicitly include a “reasonable person” due diligence standard. Section I of this Article discusses individual criminal responsibility for aiding and abetting prior to the creation of the ICTY. Section II considers the ICTY’s pre-*Perišić* interpretation of aiding and abetting responsibility. Section III discusses the *Perišić* case in detail at both the trial and appellate levels. Section IV discusses the appeals judgments in the *Charles Taylor* and the *Nikola Šainović, et al.* cases, both of which explicitly rejected “specific direction” as an element of aiding and abetting, and argues that the Appeals Chamber’s interpretation of specific direction is overly stringent. Finally, Section V concludes that the element of specific direction should either be rejected or modified to include a “reasonable person” standard.

I. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR AIDING AND ABETTING UNDER INTERNATIONAL LAW PRIOR TO THE FORMATION OF THE ICTY

After World War II, the International Military Tribunal at Nuremberg (the “Nuremberg Tribunal”) and the International Military Tribunal for the Far East (the “Tokyo Tribunal”) were established to prosecute crimes against peace, war crimes, and crimes against humanity.⁷ The Charters of both tribunals (the “Nuremberg Charter” and the “Tokyo Charter,” respectively) explicitly provided for jurisdiction over individuals—specifically, over “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy”⁸ Subsequent tribunals established in occupied Germany created pursuant to Control Council Law No. 10 also prosecuted the crimes set forth in the Nuremberg Charter, including

⁷ London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, arts. 1–2, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 85 U.N.T.S. 251 [hereinafter Nuremberg Charter]; International Military Tribunal for the Far East Charter, arts. 1, 5, Jan. 19, 1946, T.I.A.S. No. 1587 [hereinafter Tokyo Tribunal Charter].

⁸ Nuremberg Charter, *supra* note 7, art. 5; Tokyo Tribunal Charter, *supra* note 7, art. 1.

abetting the commission of such crimes. Article II(2) of Control Council Law No. 10 states as follows:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) *was an accessory to the commission of any such crime or ordered or abetted the same* or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.⁹

In a number of cases, individuals were held responsible for aiding and abetting the commission of war crimes. One example is the “*Zyklon B Case*.” Bruno Tesch was an owner of the firm of Tesch & Stabenow (“T&S”), which specialized in using a gas called Zyklon B for pest control.¹⁰ During World War II, T&S sold Zyklon B to the Nazi Schutzstaffel (“the SS”).¹¹ The British Military Court in Hamburg, Germany, tried Tesch and two others for supplying Zyklon B to the SS while knowing that it would be used to kill prisoners who were interned in Nazi operated concentration camps.¹² The prosecution claimed that Tesch and the others must have been aware of the large amounts of Zyklon B being purchased by the SS and that such amounts were too large for mere pest control.¹³ In early 1944, nearly two tons of Zyklon B were being supplied to Auschwitz each month.¹⁴ The prosecution alleged that 4.5 million people were exterminated using Zyklon B in Auschwitz alone.¹⁵ Tesch and one other defendant were found guilty of selling the poison gas to the SS that was

⁹ Control Council, Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(2), Dec. 20, 1945 (emphasis added), *available at* <http://avalon.law.yale.edu/imt/imt10.asp>.

¹⁰ The Zyklon B Case, Trial of Bruno Tesch and Two Others, Case No. 9, Judgment, Law Reports of Trials of War Criminals, Vol. 1, 93 (British Military Court, Mar. 8, 1946) [hereinafter Zyklon B].

¹¹ *Id.* at 94.

¹² *Id.* at 93–94.

¹³ *Id.* at 101.

¹⁴ *Id.* at 94.

¹⁵ *Id.*

used to exterminate human beings.¹⁶ They were each sentenced to death.¹⁷

In another prosecution, Martin Gottfried Weiss and thirty-nine others¹⁸ were tried by the General Military Court of the United States Zone located in Dachau, Germany for “willfully, deliberately, and wrongfully” aiding, abetting, and participating in subjecting civilians and captured soldiers being held at the Dachau Concentration Camp to “cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities.”¹⁹ In order to make its case against the forty defendants, the prosecution needed to prove the following: “(1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, [and] (3) that each accused, by his conduct ‘encouraged, *aided and abetted* or participated’ in enforcing this system.”²⁰ The Court found that the evidence and testimony proved these three elements for each accused defendant, and all forty were convicted.²¹

While, for many years, there were no tribunals similar to those at Nuremberg, Tokyo, and related military tribunals, individual criminal responsibility for aiding and abetting continued to be recognized under international law in numerous treaties and other sources.²²

¹⁶ *Id.* at 102.

¹⁷ *Id.*

¹⁸ Martin Gottfried Weiss was the highest ranking S.S. officer and acting Commandant of the Dachau concentration camp at the time that the camp was liberated by the United States military in 1945. The other defendants included doctors who conducted medical experiments at the camp and other camp officials, such as executioners. See *Dachau Trials: US vs. Martin Gottfried Weiss, et al*, SCRAPBOOK PAGES (April 6, 2008), <http://www.scrapbookpages.com/DachauScrapbook/DachauTrials/MartinGottfriedWeiss.html>.

¹⁹ U.N. War Crimes Commission, Case No. 60, The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others, General Military Government Court of the United States Zone, Dachau, Germany, Nov. 15-Dec. 13, 1945, in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 5 (1997) [hereinafter *Dachau*].

²⁰ *Id.* at 13 (emphasis added).

²¹ *Id.* at 8. For a comprehensive discussion of post-WW II case law on aiding and abetting, see *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber Judgment (Special Court for Sierra Leone Sept. 26, 2012) (hereinafter *Taylor Appeals Judgment*) [hereinafter *Tadić Appeals Judgment*].

²² For example, the following all include individual responsibility for aiding and abetting: (1) the 1950 Affirmation of the Principles of International Law

II. ICTY'S CASE LAW REGARDING AIDING AND ABETTING

With this backdrop of international criminal law regarding aiding and abetting, as well as domestic laws recognizing aiding and abetting as a form of responsibility,²³ the drafters of the Statute of the International Criminal Tribunals for the Former Yugoslavia ("the ICTY Statute") formulated individual criminal responsibility to include aiding and abetting. Specifically, Article 7(1) of the ICTY Statute states that: "[a] person who planned, instigated, ordered, committed or otherwise *aided and abetted* in the planning, preparation or execution of a crime referred to

Recognized by the Charter of the Nürnberg Tribunal; (2) the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (criminalizing those who abet, encourage, or cooperate in the crime of apartheid); (3) the 1984 International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (directing state parties to criminalize all acts of torture, attempts to commit torture, or "act[s] by any person which constitutes complicity or participation in torture"); and (4) the 2000 United Nations Convention against Transnational Organized Crime (directing state parties to criminalize "[o]rganizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group"). See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (Dec. 11, 1946); International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III, G.A. Res. 3068 (XXVIII), U.N. Doc. A/9030 (July 18, 1974); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85. "Complicity" is analogous to aiding and abetting in this context; United Nations Convention against Transnational Organized Crime, art. 5(1)(b), G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000), available at <http://www.unodc.org/unodc/treaties/CTOC/>.

²³ For examples of articles discussing aiding and abetting domestically, internationally, and as applied by the ICTY, see Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind*, 5 INT'L CRIM. L. REV. 623 (2005); Sean Wilkins, *Criminal Law – Accomplice Liability – A Defendant Who Intends to Aid, Abet, Counsel, or Procure the Commission of a Crime, Is Liable for that Crime as Well as the Natural and Probable Consequences of that Crime* – People v. Robinson, 715 N.W.2d 44 (Mich. 2006), 85 U. DET. MERCY L. REV. 69 (2007-2008); Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005-2006); Michael G. Karnavas, *Prosecutor v. Vidoje Blagojević, Dragan Jokić, Case No. IT-02-60-T, Trial Judgment, (Jan. 17, 2005)*, 5 INT'L CRIM. L. REV. 609 (2005); Chad G. Marzen, *The Furundzija Judgment and Its Continued Vitality in International Law*, 43 CREIGHTON L. REV. 505 (2009-2010).

in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”²⁴

A. The Duško Tadić Case

The aiding and abetting standard was first interpreted by the ICTY in the *Duško Tadić* case.²⁵ The ICTY's mandate states that it is only authorized to apply international humanitarian law that is “beyond any doubt customary law.”²⁶ Therefore, in the *Tadić* case, the ICTY was required to determine the customary international law standard for aiding and abetting in order to apply Article 7(1). The Trial Chamber considered, among other things, the Paris Peace Conference that followed World War I and the Treaty of Versailles, various war crimes trials that had convicted individuals for aiding and abetting war crimes after World War II, and various international conventions that called for ratifying states to criminalize aiding and abetting numerous international crimes.²⁷ The Trial Chamber determined that these sources established a “basis in customary international law for both individual responsibility and for participation in the various ways provided by Article 7 of the Statute.”²⁸ The Court therefore concluded that it had the authority to make findings in the cases before it, including the *Tadić* case, pursuant to Article 7.1.²⁹

²⁴ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7(1), Sept. 2009, (emphasis added), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. A corollary provision exists in the Statute of the International Criminal Tribunal for Rwanda. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6(1), Nov. 8, 1994, *available at* http://legal.un.org/avl/pdf/ha/icttr_EF.pdf.

²⁵ Prosecutor v. Tadić, Case No. IT-94-1, Trial Chamber Judgment, ¶ 662 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). [hereinafter *Tadić TC Judgment*].

²⁶ U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) and Annex Thereto, ¶ 34, U.N. Doc. S/25704 (May 3, 1993). In the Furundzija and Rwamakuba cases, the Tribunals have carried out the customary international law analysis for modes of responsibility as well as substantive crimes—aiding and abetting in the former case, joint criminal enterprise and genocide in the latter. *See infra* Part II.B.

²⁷ *See, e.g.*, Part I.

²⁸ *Tadić TC Judgment*, *supra* note 25, ¶¶ 663–69.

²⁹ *Id.* ¶ 669.

The indictment against Tadić charged him with thirty-four counts and alleged that he “participated in the attack on, seizure, murder and maltreatment of Bosnian Muslims and Croats in . . . Prijedor both within the [Omarska and Keraterm] camps and outside the camps.”³⁰ The Trial Chamber found Tadić guilty or partially guilty on eleven counts of the indictment.³¹ On appeal, the Appellate Chamber found Tadić guilty on an additional nine charges.³²

In *Tadić*, the ICTY Trial Chamber looked to various Nuremberg trial precedents to determine the standard for participation in a crime, including responsibility for aiding and abetting.³³ As to the elements of criminal participation, the Trial Chamber summarized the precedents as follows:

First, there is a requirement of *intent*, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was *participation* in that the conduct of the accused contributed to the commission of the illegal act.³⁴

Thus, the Trial Chamber held that, first, *mens rea* is required to find an individual responsible for participating in a crime—including the aiding and abetting of a crime.³⁵ The Trial Chamber cited a British Military Court for the proposition that, if an “accused took part with another man, with the knowledge that the other man was going to kill, then [the accused] was as guilty as the one doing the actual killing.”³⁶ Thus, the *Tadić* Trial Chamber held that the requisite intent for criminal responsibility could be satisfied by *knowledge* of the principal crime, meaning actual or assumed knowledge, along with participation. It

³⁰ Prosecutor v. Tadić, Case No. IT-94-1-I, Indictment (Amended), ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1995) [hereinafter *Tadić Indictment*].

³¹ Tadić TC Judgment, *supra* note 25, at 285–86.

³² See Prosecutor v. Tadić, Case No. IT-94-1, Summary of Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadić Appeals Judgment Summary*].

³³ Tadić TC Judgment, *supra* note 25, ¶¶ 664–69.

³⁴ *Id.* ¶ 674 (emphasis added).

³⁵ *Id.* ¶ 675.

³⁶ *Id.* ¶ 674, (citing *Trial of Werner Rohde and Eight Others*, in 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 51 (1997)).

also held that knowledge "can be inferred from the circumstances."³⁷ The *Tadić* Court also clarified that this mens rea standard does not require a "pre-arranged plan . . . to engage in any specific conduct" to exist.³⁸

As to the second element, actus reus, the *Tadić* Court held that it must "directly affect the commission of the crime itself."³⁹ Direct contribution does not require the accused to physically participate in the commission of the act or be physically present during its commission.⁴⁰ Furthermore, "the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced."⁴¹ The Trial Chamber referred to the *Zyklon B Case*, which held that only the following proof was necessary to hold the defendants criminally responsible for aiding and abetting: "First, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by [the defendants]; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings."⁴²

Finally, the Trial Chamber in *Tadić* discussed the amount of assistance necessary to find an accused guilty of aiding and abetting. The Court stated that mere presence at the scene of the crime is not enough. Rather, a "substantial contribution" was necessary, and defined this as a "contribution that in fact has an effect on the commission of the crime."⁴³ This means that, but for the actions of the aider and abettor, the criminal act "most probably would not have occurred in the same way."⁴⁴ For example, with respect to the *Zyklon B Case*, but for the sale of Zyklon

³⁷ *Tadić* TC Judgment, *supra* note 25, ¶ 676. The court based its finding on the *Mauthausen* case. In *Mauthausen*, sixty-one defendants had worked at a concentration camp where detainees were murdered in gas chambers. The U.S. Military Tribunal found that all sixty-one defendants had actual or inferred knowledge of the crimes occurring at the camp because the state of the camp "was of such a criminal nature as to cause every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian, to be culpably and criminally responsible." *Id.*

³⁸ *Tadić* TC Judgment, *supra* note 25, ¶ 677.

³⁹ *Id.* ¶ 678.

⁴⁰ *Id.* ¶ 679.

⁴¹ *Id.* ¶ 687.

⁴² *Id.* ¶ 680, citing *Zyklon B*, *supra* note 10, at 101.

⁴³ *Id.* ¶ 688.

⁴⁴ *Id.* ¶ 688.

B by T&S to the SS, mass murder would more than likely not have occurred via Zyklon B.⁴⁵ The ICTY Trial Chamber went on to state that “aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present.”⁴⁶

The ICTY Trial Chamber summarized its determination in the *Tadić* case as to aiding and abetting as follows:

[T]he accused will be found criminally culpable for any conduct where it is determined that he *knowingly participated* in the commission of an offence that violates international humanitarian law and his participation directly and *substantially affected the commission* of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.⁴⁷

Thus, there are two basic elements to the crime—knowing participation and substantial contribution.⁴⁸

B. The Furundžija Case

In the *Furundžija* case, the ICTY Trial Chamber expanded on what constitutes the actus reus of aiding and abetting.⁴⁹ The Court examined numerous cases, mostly post–World War II precedents, and determined that “the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances.”⁵⁰ Such assistance, however, must constitute more than mere observance of the act. To qualify as an aider and abettor, the presence of the accomplice must have a “significant legitimizing or encouraging act on the principals.”⁵¹ Regarding the effect of the assistance on the principal, the acts

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 689.

⁴⁷ *Id.* ¶ 692, emphasis added.

⁴⁸ For further discussion of ICTY case law on the aiding and abetting question, see Jennifer Trahan, *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia 370–90* (2006) [hereinafter *ICTY Digest*], available at <http://www.hrw.org/sites/default/files/reports/ictr0110webwcover.pdf>.

⁴⁹ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 192 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) [hereinafter *Furundžija TC Judgment*].

⁵⁰ *Id.* ¶ 232.

⁵¹ *Id.*

of the accomplice do not need to have a *causal* relationship to the acts of the principal.⁵² But, the acts of the accomplice must make a “significant difference to the commission of the criminal act by the principal.”⁵³ In *Furundžija*, the Trial Chamber summarized its holding by stating that “the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”⁵⁴

In 1999, the ICTY Appeals Chamber in *Tadić* agreed with the standard set forth by the Trial Chamber in cases such as *Tadić* and *Furundžija*. In summarizing the standard, however, the Appeals Chamber stated that “[t]he aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.”⁵⁵ Notably, the Trial Chamber did not use the phrase “specific direction.” On the contrary, the Appeals Chamber’s decision is where the “specific direction” language is first found in ICTY case law.⁵⁶ Moreover, the *Tadić* Appeals Chamber’s reference to “specific direction” was made while comparing aiding and abetting responsibility with joint criminal enterprise—and the Appeals Chamber provided no explanation of any basis for “specific direction.” Thus, when the *Tadić* case discussed “specific direction,” it was merely descriptive and not considered to be an element of aiding and abetting.⁵⁷

C. Other Relevant ICTY Cases

After *Tadić*, the phrase “specific direction” has been mentioned in numerous ICTY appellate judgments; however, as

⁵² *Id.* ¶ 233.

⁵³ *Id.*

⁵⁴ *Id.* ¶ 235. As a side note, the Appeals Chamber in the *Furundžija* case rejected each of Furundžija’s grounds for appeal, dismissed the appeal, affirmed the convictions and sentences, and did not discuss or alter the Trial Chamber’s aiding and abetting standard. See Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000).

⁵⁵ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 229(iii) (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (emphasis added).

⁵⁶ *Id.*

⁵⁷ See *infra* Section IV.B.2.

Judge Liu notes in his Partially Dissenting Opinion to the *Perišić* Appellate Judgment,⁵⁸ “the cases cited by the [*Perišić* Appeals Chamber] as evidence of an established specific direction requirement merely make mention of ‘acts directed at specific crimes’ as an element of the actus reus of aiding and abetting liability.”⁵⁹ These cases simply restate the language used in the

⁵⁸See *infra* Section III.E.

⁵⁹Prosecutor v. *Perišić*, Case No. IT-04-81-A, Appeals Chamber Judgment, Judge Liu Dissent, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) [hereinafter *Perišić* Appeals Judgment, Judge Liu Dissent]. The following ICTY and ICTR appellate judgments are cited by the *Perišić* Appeals Chamber as requiring “specific direction” as an element of the actus reus, but are in fact simply reciting the phrase without defining or applying it: Prosecutor v. *Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶ 89 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 25, 2005); Prosecutor v. *Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 45 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. *Vasiljević*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 102 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004); Prosecutor v. *Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgment, ¶ 33 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Prosecutor v. *Kupreškić et al.*, Case No. IT-95-16-A, Appeals Chamber Judgment, ¶ 254 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001) [hereinafter *Kupreškić* Appeals Judgment] (It should be noted that the *Lieu* Dissent refers to the *Perišić* Appeals Chamber’s majority’s reference to paragraph 254 of the *Kupreškić* Appeals Judgment. However, in note 103 of the majority opinion, the majority references paragraphs 275-77 of the *Kupreškić* Appeals Judgment, which it states finds that “a six-month delay between an appellant being observed unloading weapons and a subsequent attack reduced the likelihood that these weapons were directed towards assisting in this attack.” Arguably, this might signify that the *Kupreškić* Appeals Judgment found that aiding and abetting could not be proven because there was insufficient specific direction due to significant temporal distance between actions.); Prosecutor v. *Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 163 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Appeals Chamber Judgment, ¶ 74 (Int’l Crim. Trib. for Rwanda Oct. 20, 2010); *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Appeals Chamber Judgment, ¶ 79 (Int’l Crim. Trib. for Rwanda April 1, 2011); Prosecutor v. *Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber Judgment, ¶ 139 (Int’l Crim. Trib. for Rwanda Mar. 12, 2008); *Nahimana, et al. v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Chamber Judgment, ¶ 482 (Int’l Crim. Trib. for Rwanda Nov. 28, 2007); *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Appeals Chamber Judgment, ¶ 189 (Int’l Crim. Trib. for Rwanda May 21, 2007); Prosecutor v. *Ntagerura et al.*, Case No. ICTR-99-46-A, Appeals Chamber Judgment, ¶ 370 (Int’l Crim. Trib. for Rwanda July 7, 2006); Prosecutor v. *Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-17-A, Appeals Chamber Judgment, ¶ 530 (Int’l Crim. Trib. for Rwanda July 7, 2006); Prosecutor v. *Simić, et al.*, Case No.

Tadić Appeals Chamber Judgment without defining the meaning, without elucidating the parameters or application of the standard, and without applying it to the facts of the given case.⁶⁰ Furthermore, several cases have disavowed the standard or simply not applied it when adjudicating aiding and abetting responsibility.⁶¹

For instance, in *Prosecutor v. Blagojević and Jokić*, the ICTY Appeals Chamber revisited the “specific direction” language used by the Appeals Chamber in *Tadić*.⁶² In *Blagojević and Jokić*, defendant Jokić argued that the Appeals Chamber had “included specific direction as a required legal element in defining the actus reus of aiding and abetting and . . . has not since departed from this definition.”⁶³ In response, the Appeals Chamber first noted that the “specific direction” language was used in a section of the *Tadić* Appeals Judgment in which the Court was “distinguishing aiding and abetting from acting in pursuit of a common purpose or design to commit a crime” because in the latter instance, the alleged participant performs acts that are only “in some way directed” to furthering the common plan or purpose.⁶⁴ The Appeals Chamber then examined several cases that quoted the *Tadić* Appeals Chamber standard and concluded as follows:

While the *Tadić* definition has not been explicitly departed from, *specific direction has not always been included as an element of the actus reus of aiding and abetting*. This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance

IT-95-9-A, Appeals Chamber Judgment, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006); *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber Judgment, ¶ 43 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008); *Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Appeals Chamber Judgment, ¶ 214 (Int'l Crim. Trib. for Rwanda Dec. 14, 2011); *Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-A, Appeals Chamber Judgment, ¶ 52 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010); *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Appeals Chamber Judgment, ¶ 321 (Int'l Crim. Trib. for Rwanda Feb. 2, 2009).

⁶⁰ *Perišić Appeals Judgment*, Liu Dissent, *supra*, note 59; *but see Kupreškić Appeals Judgment*, *supra*, note 59.

⁶¹ *Id.*

⁶² *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007) [hereinafter *Blagojević and Jokić Appeals Judgment*].

⁶³ *Id.* ¶ 184 (italics omitted).

⁶⁴ *Id.* ¶ 185.

to the principal perpetrator which had a substantial effect on the commission of the crime.⁶⁵

Similarly, in *Prosecutor v. Mrškić, et al.*, defendant Šljivančanin asserted that specific direction to assist, encourage, or lend moral support is required, and that mere knowledge that certain actions facilitate the commission of crimes by the principal actor is not sufficient.⁶⁶ The Appeals Chamber noted that Šljivančanin was incorrectly conflating the mens rea and actus reus standards for aiding and abetting.⁶⁷ In addition, the Appeals Chamber then stated that it “has confirmed that ‘specific direction’ is *not* an essential ingredient of the actus reus of aiding and abetting.”⁶⁸ The Appeals Chamber in *Lukić & Lukić*, cited and concurred with the discussions rejecting specific direction as an element in the *Blagojević and Jokić*, and *Mrškić, et al.* appeals judgments.⁶⁹

Thus, while the issue of “specific direction” is not new, having first been mentioned in *Tadić* and later cases, the Appeals Chamber in *Blagojević and Jokić*, *Mrškić, et al.*, and *Lukić & Lukić* concluded that it is not an essential element of aiding and abetting.⁷⁰

III. THE MOMČILO PERIŠIĆ CASE

The ICTY Appeals Chamber’s approach to whether specific direction is an element of aiding and abetting dramatically changed with the controversial 2013 holding in *Prosecutor v. Perišić*, which found that aiding and abetting requires specific direction.⁷¹

⁶⁵ *Id.* ¶ 189 (emphasis added).

⁶⁶ *Prosecutor v. Mrškić, et al.*, Case No. IT-95-13/1-A, Appeals Chamber Judgment, ¶ 157 (Int’l Crim. Trib. for the Former Yugoslavia May 5, 2009) [hereinafter *Mrškić Appeals Judgment*].

⁶⁷ *Id.*

⁶⁸ *Mrškić Appeals Judgment*, *supra* note 66, ¶ 159 (citing *Blagojević and Jokić Appeals Judgment*, *supra* note 62, ¶¶ 188–89 (emphasis added)).

⁶⁹ *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-A, Appeals Chamber Judgment, ¶ 424 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012) [hereinafter *Lukić Appeals Judgment*].

⁷⁰ *Blagojević and Jokić Appeals Judgment*, *supra* note 62, ¶ 189; *Mrškić Appeals Judgment*, *supra* note 66, ¶ 159; *Lukić Appeals Judgment*, *supra* note 71, ¶ 424.

⁷¹ *Perišić Appeals Judgment*, *supra* note 5, ¶ 30.

A. The Perišić Indictment

Momčilo Perišić, as Chief of the Yugoslav Army General Staff from 1993 to 1998, was the top military officer of the Yugoslav Army ("VJ"), headquartered in Belgrade, Serbia.⁷² According to the Second Amended Indictment, Perišić's position gave him authority to

(1) make and implement decisions for the VJ General Staff and all subordinate units; (2) issue orders, instructions, [and] directives [and to ensure their implementation]; and (3) transfer and second VJ personnel to Army of the Republic of Srpska and the Army of the Serbian Krajina [(the "SVK")]⁷³

The Perišić Indictment set forth a lengthy discussion of Perišić's significant involvement with and assistance to the VRS.⁷⁴ The indictment alleged that in early 1995, Radovan Karadžić, the former President of Republika Srpska and Supreme Commander of the VRS, directed the VRS to "eliminate the Muslim enclaves of Srebrenica and Žepa."⁷⁵ The indictment further alleged that Perišić knew that the attack was planned, and also knew that some VRS members would commit criminal acts including persecution, forcible transfers, and killings.⁷⁶ In July 1995, according to the indictment, over 7,000 Bosnian Muslim men and boys were executed by VRS forces in the areas surrounding the town of Srebrenica in the worst act of genocide to occur in Europe since World War II.⁷⁷ Many of the victims were

⁷² Perišić TC Judgment, *supra* note 2, ¶ 2; Perišić TC Judgment Summary, *supra* note 2, at 1.

⁷³ Prosecutor v. Perišić, Case No. IT-04-81, Second Amended Indictment, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 5, 2008) [hereinafter Perišić Indictment].

⁷⁴ *Id.* ¶¶ 10–39.

⁷⁵ *Id.* ¶ 56.

⁷⁶ *Id.*

⁷⁷ *Id.* ¶¶ 57, 61. A more accurate figure is over 8,000. Maja Zuvela, *Bosnia Re-buries Srebrenica Dead 18 Years After Massacre*, REUTERS (July 11, 2013, 10:44 AM, EDT), <http://www.reuters.com/article/2013/07/11/us-bosnia-srebrenica-idUSBRE96A0HJ20130711>. Perišić was not the only person to be tried for criminal responsibility related to the Srebrenica massacre; Ratko Mladić and Radovan Karadžić currently also stand accused of genocide at Srebrenica and elsewhere. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appellate Judgment, Disposition, ¶ 39 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (wherein the ICTY Appeals Chamber unanimously found that "genocide was committed at Srebrenica in 1995" and that Krstić was "guilty of aiding and abetting genocide").

buried in mass graves.⁷⁸ In addition, over 25,000 Bosnian Muslims were forcibly transferred from Srebrenica and surrounding areas.⁷⁹ After the mass executions, VRS units exhumed bodies from the mass graves and reburied them in an attempt to conceal the killings.⁸⁰ The indictment charged Perišić with aiding and abetting these unlawful killings, inhumane acts, and forcible transfers.⁸¹ Perišić was also charged with aiding and abetting the planning, preparation, or execution of shelling and sniping of civilian areas in Sarajevo, resulting in the wounding and deaths of thousands of civilians.⁸² He was additionally charged with planning, instigating, ordering, committing, or otherwise aiding and abetting the shelling of civilian areas in the city of Zagreb by the SVK.⁸³

B. The Perišić Trial Chamber Judgment and Opinion Related to Aiding and Abetting

The Trial Chamber stated that, to find Perišić guilty for aiding and abetting, it would need to find that Perišić: (1) provided “practical assistance, encouragement, or moral support to the principal perpetrator of the crime which had a substantial effect on the perpetration of the crime;” (2) knew his acts would assist the principal; and (3) was aware of elements of the crime, including the principal’s state of mind.⁸⁴ The Trial Chamber stated that specific direction is *not* a required element of the actus reus for criminal aiding and abetting responsibility.⁸⁵ Rather, the element of substantial assistance may be proven by other forms of practical assistance.⁸⁶ The Trial Chamber majority opinion held that there is no requirement: (1) for a cause and effect relationship between aiding and abetting and the commission of crimes;

⁷⁸ *Id.* ¶ 57.

⁷⁹ *Id.* ¶ 61.

⁸⁰ *Id.* ¶ 57.

⁸¹ *Id.* ¶ 60.

⁸² Perišić Indictment, *supra* note 73, ¶ 40.

⁸³ *Id.* ¶ 47.

⁸⁴ Perišić TC Judgment, *supra* note 2, ¶ 1580.

⁸⁵ *Id.* ¶ 1624, *citing* Mrškić Appeals Judgment, *supra* note 66, ¶ 159; Blagojević and Jokić Appeals Judgment, *supra* note 62, ¶¶ 192, 195.

⁸⁶ Perišić TC Judgment, *supra* note 2, ¶ 1580.

(2) that the aider and abettor's actions were a condition precedent to the commission of crimes; or (3) that the aider and abettor's actions were the cause *sine qua non* of the crimes.⁸⁷

On September 6, 2011, after a trial lasting over three years in which over 100 witnesses testified and 3,794 documents were presented to the Court, the Trial Chamber convicted Perišić, with Judge Moloto dissenting.⁸⁸ The Trial Chamber issued a 573 page Judgment and Opinion, in which it found that both the *actus reus* and *mens rea* standards for criminal aiding and abetting responsibility had been met and found Perišić guilty of all aiding and abetting charges except for Count 13 ("extermination [in Srebrenica] as a crime against humanity pursuant to Articles 7(1) and 7(3) of the Statute").⁸⁹ He was also found guilty of four charges and acquitted of eight charges for acting as a superior and failing to punish his subordinates.⁹⁰ He was sentenced to twenty-seven years of imprisonment.⁹¹

Specifically, the Trial Chamber found that the VRS's strategy involved no distinction between warfare against opposing forces and crimes against civilians.⁹² It found that the VRS's crimes were "inextricably linked to the war strategies and objectives of the VRS leadership,"⁹³ and that Perišić continued the policy of the VJ regarding assistance to the VRS that existed before he was elevated to Chief of the VJ General Staff by providing "comprehensive military assistance" to the VRS.⁹⁴ The Trial Chamber concluded that the evidence demonstrated that, without VJ support, the VRS would not have been able to engage in the activities that it did.⁹⁵ Karadžić stated that "nothing would happen without Serbia. We do not have those resources and we would not be able to fight."⁹⁶ The Trial Chamber also found that the evidence showed that the VRS depended heavily on Federal Republic of Yugoslavia and VJ logistical and personnel assistance in order to wage war.⁹⁷ The Trial Chamber thus concluded that

⁸⁷ *Id.* ¶ 1580.

⁸⁸ Perišić TC Judgment Summary, *supra* note 2, at 1.

⁸⁹ Perišić TC Judgment, *supra* note 2, ¶¶ 1836, 1838.

⁹⁰ *Id.* ¶¶ 1837, 1839.

⁹¹ *Id.* ¶ 1840.

⁹² *Id.* ¶ 1588.

⁹³ *Id.*

⁹⁴ *Id.* ¶ 1594–95.

⁹⁵ *Id.* ¶ 1597.

⁹⁶ *Id.* ¶ 1598.

⁹⁷ *Id.* ¶¶ 1602, 1619.

Perišić's logistical and personnel assistance to the perpetrators of the crimes had a substantial effect on the VRS's perpetration of crimes in Sarajevo and Srebrenica, and that, because he was provided with information from multiple sources of the "VRS's criminal behaviour and discriminatory intent" and provided substantial assistance with this state of mind, he knowingly contributed to the crimes.⁹⁸

C. Judge Moloto's Dissent Related to Aiding and Abetting

Judge Moloto, the lone dissenter from the Trial Chamber's majority opinion in *Perišić*, stated that:

[P]roviding assistance to the VRS to wage war cannot and should not be equated with aiding and abetting the crimes committed during such war. The provision of assistance by Perišić to the VRS is too remote from the crimes committed during the war to qualify as aiding and abetting such crimes. To conclude otherwise, as the Majority has done, is to criminalise the waging of war, which is not a crime according to the Statute of the Tribunal. In addition, it raises the question: where is the cut-off line?⁹⁹

Judge Moloto stated that, even though the VRS was largely dependent upon the assistance of the VJ to function, that does not mean that the assistance had a substantial effect on the commission of crimes.¹⁰⁰ He went on to argue that the majority was conflating the requirements of aiding and abetting with those of joint criminal enterprise.¹⁰¹

Judge Moloto specifically disagreed with the Trial Chamber majority's conclusion that specific direction is not a required element for criminal aiding and abetting responsibility.¹⁰² He stated that the notion of specific direction was "consistently cited" by the ICTY when defining aiding and abetting.¹⁰³ Judge Moloto argued that a "direct link needs to be established between the conduct of the aider and abettor and the commission

⁹⁸ *Id.* ¶¶ 1627, 1631.

⁹⁹ Prosecutor v. Perišić, Case No. IT-04-81, Trial Chamber Judgment, Moloto Dissent, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) [hereinafter *Perišić TC Judgment, Moloto Dissent*].

¹⁰⁰ *Id.* ¶ 4.

¹⁰¹ *Id.* ¶ 5.

¹⁰² *Id.* ¶ 9.

¹⁰³ *Id.*

of the crimes,” and that in cases where an alleged aider and abettor is remote from the crime scene, “specific direction must form an integral and explicit component of the objective element of aiding and abetting.”¹⁰⁴ With respect to Perišić, Judge Moloto maintained that the direct evidence presented did not demonstrate the existence of such a link, and that circumstantial evidence was not sufficient because more than one reasonable conclusion could be drawn from the evidence.¹⁰⁵ In conclusion, Judge Moloto stated as follows:

If we are to accept the Majority’s conclusion based solely on the finding of dependence, as it is *in casu*, without requiring that such assistance be specifically directed to the assistance of crimes, then all military and political leaders, who on the basis of circumstantial evidence are found to provide logistical assistance to a foreign army dependent on such assistance, can meet the objective element of aiding and abetting. I respectfully hold that such an approach is manifestly inconsistent with the law.¹⁰⁶

D. The Perišić Appeals Chamber Judgment Related to Aiding and Abetting

On appeal of the Trial Chamber’s Judgment, the Appeals Chamber noted that it first set the standard for criminal aiding and abetting responsibility in *Tadić*.¹⁰⁷ As noted above, in that case, the Appeals Chamber had distinguished aiding and abetting from a joint criminal enterprise by stating that the actus reus of aiding and abetting requires that acts be specifically directed toward assisting the crime, whereas the actus reus of joint criminal enterprise requires that acts be directed toward assistance “in some way.”¹⁰⁸ The *Perišić* Appeals Chamber went on to state that it had not departed from that definition, and that the ICTY and the International Criminal Tribunal for Rwanda

¹⁰⁴ *Id.* ¶ 10.

¹⁰⁵ *Id.* ¶¶ 11–13.

¹⁰⁶ *Id.* ¶ 33.

¹⁰⁷ Perišić Appeals Judgment, *supra* note 5, ¶ 26.

¹⁰⁸ *Id.* ¶¶ 26–27.

(“ICTR”) had explicitly referred to specific direction in subsequent judgments.¹⁰⁹

With respect to several judgments that did not explicitly refer to specific direction, the *Perišić* Appeals Chamber explained that those cases (1) employed equivalent standards,¹¹⁰ (2) did not discuss aiding and abetting responsibility—including specific direction—comprehensively, or (3) cited to previous judgments which had discussed specific direction.¹¹¹ The Appeals Chamber then confronted the language in the *Mrškić and Šljivančanin* Appeals Judgment that explicitly stated that specific direction was not required for the aiding and abetting actus reus. The Appeals Chamber stated that: (1) this statement was contained in a section discussing the requisite mens rea element, not actus reus; (2) the authority cited to support the statement was in the *Blagojević and Jokić* Appeals Judgment, which holds that specific direction is required;¹¹² and 3) it is the practice of the Appeals Chamber to only depart from previously settled standards when careful consideration is given, and the passing reference to specific direction in the *Mrškić and Šljivančanin* judgment did not amount to careful consideration.¹¹³ The Appeals Chamber thus concluded that there was never an intention or attempt to depart from the “settled precedent” that specific direction is a required element of the aiding and abetting actus reus.¹¹⁴

Nevertheless, the Appeals Chamber held that, where an alleged aider and abettor commits acts that are “geographically or otherwise proximate” to the crimes in question, specific direction may not need to be addressed explicitly because it can be demonstrated by discussion of other elements, such as substantial contribution.¹¹⁵ In cases where the alleged aider and abettor is remote from the crimes at issue, however, specific direction must

¹⁰⁹ *Id.* ¶ 28. For further discussion of the ICTR’s discussion of aiding and abetting law, see Jennifer Trahan, *Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda 202–23* (Human Rights Watch 2010).

¹¹⁰ *Id.* ¶ 29.

¹¹¹ *Id.* ¶ 30.

¹¹² It should be noted that the *Blagojević and Jokić* Appeals Judgment also states that specific direction may be satisfied implicitly through a substantial contribution analysis.

¹¹³ *Id.* ¶ 34.

¹¹⁴ *Id.* ¶ 35–36.

¹¹⁵ *Id.* ¶ 38.

be explicitly considered.¹¹⁶ The Appeals Chamber did not identify factors that would determine sufficient remoteness to require explicit consideration of specific direction, but instead stated that such a determination would be case specific and factors such as significant geographical or temporal distance might be relevant.¹¹⁷

Regarding the *Perišić* case, specifically, the Appeals Chamber concluded that Perišić's alleged assistance to the VRS was remote from the crimes because (1) the VRS and VJ were independent from one another, (2) the two armies were in separate regions, and (3) no evidence was presented that Perišić was ever physically present when crimes were planned or committed.¹¹⁸ Therefore, the Appeals Chamber determined that significant remoteness existed to trigger the requirement for an explicit discussion of specific direction.¹¹⁹ Since such an examination was not conducted by the Trial Chamber, the Appeals Chamber determined that it was required to assess the evidence de novo.¹²⁰

In connection with its review, the Appeals Chamber first noted that previous judgments had not clarified what types of evidence might prove specific direction, and thus the evidence would be case specific.¹²¹ The Appeals Chamber did find that general assistance that "could be used for both lawful and unlawful activities" would not be sufficient by itself.¹²² In such cases, evidence demonstrating a direct link between aid and crimes would be necessary.¹²³ On de novo review, the Appeals Chamber concluded that the VJ policy to provide assistance to the VRS was adopted by the Supreme Defense Council (the "SDC") of the Former Republic of Yugoslavia (the "SRY") before Perišić was appointed to the Chief position, and that the SDC retained and exercised power to review this policy and any requests for aid by the VRS.¹²⁴ The Appeals Chamber then conducted inquiries into whether the VRS's exclusive purpose was to commit crimes and

¹¹⁶ *Id.* ¶ 39.

¹¹⁷ *Id.* ¶ 40.

¹¹⁸ *Id.* ¶ 42.

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶¶ 42–43.

¹²¹ *Id.* ¶ 42.

¹²² *Id.* ¶¶ 43–44.

¹²³ *Id.* ¶ 44.

¹²⁴ *Id.* ¶ 50.

whether the SDC's VRS assistance policy endorsed assisting the VRS's crimes.¹²⁵

Regarding the first inquiry, the Appeals Chamber noted that the Trial Chamber did not find that the VRS was a criminal organization.¹²⁶ The Appeals Chamber then noted that, although the Trial Chamber found that the VRS's strategy was inextricably intertwined with crimes against civilians, the Trial Chamber did not determine that *all* VRS activities were criminal in nature.¹²⁷ Thus, the Appeals Chamber concluded that since the VRS was not proven to be a criminal operation, the VJ's policy of assistance to the VRS did not show specific direction to assist crimes.¹²⁸

Regarding the second inquiry, the Appeals Chamber stated that the Trial Chamber did not identify evidence demonstrating that the SDC policy "directed aid towards VRS criminal activities in particular," and the Appeals Chamber's *de novo* review of the evidence did not find any such evidence.¹²⁹ The Appeals Chamber stated further that the "volume of assistance" does not necessarily prove specific direction.¹³⁰ Specifically, in the *Perišić* case, the Appeals Chamber stated that the evidence showing Perišić's volume of assistance was circumstantial.¹³¹ In order to utilize circumstantial evidence to prove specific direction, the Court stated that specific direction must be the "sole reasonable evidence" after reviewing all of the evidence.¹³² Based upon the results of these two inquiries, the Appeals Chamber concluded that the "aid Perišić facilitated was not proved to be specifically directed towards the VRS's criminal activities."¹³³

The Appeals Chamber then considered whether Perišić implemented the SDC policy in a way that redirected aid toward VRS crimes or took outside actions that redirected aid in such a way.¹³⁴ The Appeals Chamber noted that the Trial Chamber found evidence demonstrating that Perišić supported the SDC

¹²⁵ *Id.* ¶ 52.

¹²⁶ *Id.* ¶ 53.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* ¶¶ 54–55.

¹³⁰ *Id.* ¶ 56.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* ¶ 58.

¹³⁴ *Id.* ¶ 59.

assistance policy.¹³⁵ The Trial Chamber, however, did not identify any evidence showing that Perišić specifically directed aid toward VRS criminal activities or supported such direction.¹³⁶

The Appeals Chamber also considered whether the “nature and distribution of VJ aid” could provide specific direction circumstantial evidence.¹³⁷ Regarding secondment of personnel to the VRS, the Appeals Chamber did not locate any evidence indicating that the policy of secondment was specifically to facilitate the criminal acts of the VRS.¹³⁸ The Court stated that the fact that certain VJ soldiers who were seconded to the VRS committed crimes was not, by itself, sufficient to demonstrate specific direction.¹³⁹ With respect to logistical aid, the Appeals Chamber concluded that the aid provided to the VRS by the VJ did not “appear incompatible with lawful military operations.”¹⁴⁰ Finally, the Appeals Chamber did not find evidence showing that (1) Perišić delivered aid in his role as Chief of the General Staff in a way that directed it toward VRS crimes, even though he may have known about such crimes, or that (2) Perišić delivered such directed aid outside his role as Chief of the General Staff.¹⁴¹

Accordingly, based upon a review of the evidence and its finding that no specific direction was proven to exist, the Appeals Chamber reversed the Trial Chamber’s Judgment and acquitted Perišić on all counts.¹⁴²

E. Judge Liu’s Partial Dissent Regarding Aiding and Abetting

Judge Liu challenged the Appeals Chamber’s conclusion that specific direction is required. Judge Liu stated that, while specific direction has been mentioned in ICTY cases, it has not been consistently applied.¹⁴³ He noted that, in the cases where specific direction was mentioned, the Appeals Chamber simply

¹³⁵ *Id.* ¶ 60.

¹³⁶ *Id.* ¶¶ 60–61.

¹³⁷ *Id.* ¶ 62.

¹³⁸ *Id.* ¶ 63.

¹³⁹ *Id.*

¹⁴⁰ *Id.* ¶ 65.

¹⁴¹ *Id.* ¶¶ 66–69.

¹⁴² *Id.* ¶¶ 70–74, 120, and 122. The Trial Chamber judgment regarding all charges against Perišić was reversed—both aiding and abetting and superior responsibility—and Perišić was completely acquitted. An analysis of the Appeals Chamber’s discussion of superior responsibility is outside the scope of this article.

¹⁴³ Perišić Appeals Judgment, Judge Liu Dissent, *supra* note 59, ¶ 2.

quoted the language from *Tadić* without actually applying the specific direction requirements to the facts.¹⁴⁴ Furthermore, Judge Liu stated that ICTY cases indicate that aiding and abetting responsibility may be established without proof of specific direction.¹⁴⁵ As such, Judge Liu found that insisting on a specific direction requirement “effectively raises the threshold for aiding and abetting responsibility” and would undermine “the very purpose of aiding and abetting responsibility by allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts.”¹⁴⁶

Judge Liu also evaluated the evidence considered by the Trial Chamber and the Trial Chamber’s analysis thereof.¹⁴⁷ Judge Liu reiterated that the Trial Chamber concluded that: (1) Perišić was responsible for assisting the VRS’s criminal acts;¹⁴⁸ (2) the VRS’s war strategy and criminal acts were “inextricably linked”;¹⁴⁹ (3) Perišić’s role went beyond merely providing logistical assistance in that he “*recurrently encouraged*” the SDC to maintain assistance;¹⁵⁰ (4) Perišić presided over a “system providing *comprehensive* military assistance to the VRS” which “sustained the *very life line* of the VRS and created the conditions for it to implement a war strategy that encompassed the commission of crimes against civilians”;¹⁵¹ and (5) Perišić was aware of the VRS’s crimes, and its propensity to commit more, and yet continued to provide assistance in spite of this knowledge.¹⁵² Judge Liu therefore concluded that the Trial Chamber “did not err in its assessment of the evidence on the record or in its analysis of aiding and abetting liability.”¹⁵³

¹⁴⁴ *Id.*; but see Kupreškić Appeals Judgment, *supra* note 59.

¹⁴⁵ *Id.* ¶ 2 (citing Mrškić Appeals Judgment, *supra* note 66, ¶ 159; Lukić Appeals Judgment, *supra* note 69, ¶ 424).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* ¶¶ 4–8.

¹⁴⁸ *Id.* ¶ 4.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶ 5.

¹⁵¹ *Id.* ¶¶ 6–7.

¹⁵² *Id.* ¶ 8.

¹⁵³ *Id.* ¶ 9.

IV. THE *PERIŠIĆ* APPEALS CHAMBER'S INTERPRETATION OF "SPECIFIC DIRECTION" IS OVERLY STRINGENT AND HAS BEEN REJECTED BY SUBSEQUENT ICTY AND SPECIAL COURT FOR SIERRA LEONE APPEALS CHAMBER DECISIONS

A. The Perišić Appeals Chamber's Interpretation of "Specific Direction" Is So Stringent That It Potentially Eviscerates Aiding and Abetting Under International Criminal Law

The *Perišić* Appeals Chamber's determination that specific direction is a required element ends up establishing a standard so stringent that it is difficult to imagine a scenario where it could be met. As mentioned above, the Appeals Chamber conducted inquiries into whether the VRS's *exclusive purpose* was to commit crimes and whether the SDC's VRS assistance policy endorsed assisting the VRS's crimes.¹⁵⁴ Yet, rarely would military units be devoted exclusively to committing crimes. Even the most notorious of paramilitary groups active in the Balkans conflict, such as Arkan's Tigers, participated in some arguably legitimate military activities. If aiding and abetting is limited to scenarios where a military's or paramilitary's exclusive purpose is to commit crimes, it will be effectively eviscerated. Alternatively, the *Perišić* Appeals Chamber required that aid be specifically directed toward criminal activities in order to qualify as aiding and abetting.¹⁵⁵ This interpretation is also too stringent. A provider could have knowledge of crimes being committed by a recipient and choose to do nothing, or even encourage the recipient to continue the behavior, as opposed to initially specifically directing provisions toward the recipient's criminal activities. The Appeals Chamber discounted evidence submitted to, and analyzed by, the Trial Chamber that would have, at least, proven that the assistance policy endorsed the VRS's crimes, such as: (1) the VRS's war strategy and criminal acts were "inextricably linked";¹⁵⁶ (2) *Perišić* knew of the VRS's criminal acts and propensity to continue committing such acts;¹⁵⁷ (3) in spite of that knowledge, *Perišić* encouraged the SDC multiple times to continue assistance when SDC officials questioned the policy;¹⁵⁸

¹⁵⁴ *Perišić* Appeals Judgment, *supra* note 5, ¶ 52.

¹⁵⁵ *Id.*

¹⁵⁶ *Perišić* Appeals Judgment, Judge Liu Dissent, *supra* note 61, ¶ 4.

¹⁵⁷ *Id.* ¶ 8.

¹⁵⁸ *Id.* ¶ 5.

and (4) but for the provision of aid, the VRS could not have carried out its strategic objectives.¹⁵⁹ The Appeals Chamber's determination that these factors did not rise to the level of aiding and abetting begs the question as to what actions would meet such a high bar.

The *Perišić* Appeals Chamber's "specific direction" requirement led the ICTY to acquit Jovica Stanišić and Franko Simatović, despite seemingly strong evidence of criminal responsibility. In the *Stanišić and Simatović* Trial Chamber Judgment, released after the *Perišić* Appeals Chamber decision, the Court examines a conversation between Radovan Karadžić and Jovica Stanišić where they discussed how Serbs and Croats might resolve the issues between them.¹⁶⁰ Stanišić said: "With killings."¹⁶¹ He then continued: "No. We'll then have to push them to go to Belgrade, you know! . . . There is nothing else left for us to do. . . . Or we'll exterminate them completely so let's see where we'll end up."¹⁶² Karadzic agreed with this statement and Stanišić then stated: "No, if they want it, they'll have it. Then they'll have an all-out war. . . . Better do it like decent people."¹⁶³ The *Stanišić and Simatović* Court evaluated, based on this and other evidence, whether or not the defendants were guilty of aiding and abetting, and, after stating that specific direction was part of the standard, determined that Stanišić and Simatović were not guilty.¹⁶⁴ Thus, even in a case where there was evidence that the defendant suggested that problems would be resolved by *completely exterminating* the opposing side, the Court still found that this was "too vague" to be considered intent to aid and abet crimes such as murder and forcible displacement committed as persecution.¹⁶⁵

Interestingly, Judge Meron, President of the ICTY, posed the following hypothetical to the prosecution during the *Perišić* appeals hearing:

¹⁵⁹ *Id.* ¶¶ 6–7.

¹⁶⁰ Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-T, Trial Chamber Judgment – Vol. II of II, ¶ 2307 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013) [hereinafter *Stanišić and Simatović* TC Judgment].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* ¶¶ 1264, 2356–61.

¹⁶⁵ *Id.* ¶¶ 2309, 2356–61.

Now, assume that the military aid supplied by country [A to country B] is 100 percent So we don't have to worry about the origin of the munition[s]. Assume that it . . . comprises the entire supply. The country supplies[,] therefore[,] the entire military aid to a warring party in the neighbouring country B. In the neighbouring country B[,] there is a war going on and the recipient engages both in lawful military activities but also in large-scale shelling of civilian towns. Would[,] without more[,] the Chief of Staff of country A be criminally liable?¹⁶⁶

Thus, it appears that one or more judges in the Appellate Chamber may have been considering larger implications—for example, how aiding and abetting without specific direction might have an impact on military assistance from one country to another.¹⁶⁷

B. Appellate Chambers That Have Considered the Standard for Aiding and Abetting After Perišić Have Rejected “Specific Direction” as an Element

1. The Charles Taylor Case

By contrast, the Appeals Chamber for the Special Court for Sierra Leone (“SCSL Appeals Chamber”) not long thereafter issued a judgment in *Prosecutor v. Charles Taylor* rejecting “specific direction” as an element of aiding and abetting.¹⁶⁸ The SCSL Appeals Chamber held that while it is “guided by the decisions of the ICTY and ICTR Appeals Chamber . . . as well [as] . . . the decisions of the Appeals Chamber of the [Extraordinary Chambers in the Courts of Cambodia] and the [Special Tribunal for

¹⁶⁶ *Prosecutor v. Perišić*, Case No. IT-04-81-A, Transcript of Appeals Chamber Hearing, p. 62, ll. 5–12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 30, 2012) [hereinafter *Perišić Appeals Hearing Transcript*]. In a controversial letter, Judge Harhoff accused Judge Meron of pressuring other judges on the appellate panel to change the aiding and abetting standard. See Letter from Judge Frederik Harhoff, ICTY (June 6, 2013), <http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf>; see also Marlise Simons, *International Judge is Removed from Case Over Apparent Bias*, N.Y. TIMES, Aug. 31, 2013, at A15. Judge Harhoff has since come under criticism for writing the letter in the first place. See, e.g., Kevin Jon Heller, *The Real Judge Meron Scandal at the ICTY*, OPINIO JURIS (June 17, 2013, 9:58 PM), <http://opiniojuris.org/2013/06/17/the-real-judge-meron-scandal-at-the-icty/>. Judge Harhoff resigned from the ICTY.

¹⁶⁷ *Perišić Appeals Hearing Transcript*, p. 62, ll. 5–12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 30, 2012).

¹⁶⁸ *Taylor Appeals Judgment*, *supra* note 21.

Lebanon],” that it is the “final arbiter for the law for this Court, and the decisions of other courts are only persuasive, not binding, authority.”¹⁶⁹ The SCSL Appeals Chamber conducted a very thorough review of post–World War II jurisprudence on aiding and abetting, the Draft Code of Crimes against the Peace and Security of Mankind,¹⁷⁰ state practice, and the Statute of the Special Court for Sierra Leone.¹⁷¹ The Appeals Chamber determined that none of these sources required an *actus reus* element of “specific direction.”¹⁷² The SCSL Appeals Chamber thus found that

the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute and customary international law is that an accused’s acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime for which he is to be held responsible.¹⁷³

The SCSL Appeals Chamber noted that, even though the *Perišić* Appeals Chamber stated that it was not departing from prior ICTY precedent regarding specific direction, the “ICTY Appeals Chamber’s jurisprudence does not contain a clear, detailed analysis of the authorities supporting the conclusion that ‘specific direction’ is an element of the *actus reus* of aiding and abetting liability under customary international law.”¹⁷⁴ The SCSL Appeals Chamber also rejected the *Perišić* Appeals Chamber’s determination that geographical proximity to the crime at issue can be a deciding factor.¹⁷⁵ The SCSL Appeals Chamber held that “[w]hile an accused may be physically distant from the commission of the crime, he may in fact be in proximity to and interact with those ordering and directing the commission of crimes.”¹⁷⁶

¹⁶⁹ *Id.* ¶ 472.

¹⁷⁰ INTERNATIONAL LAW COMMISSION, *Draft Code of Crimes Against the Peace and Security of Mankind* (1996), http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

¹⁷¹ Taylor Appeals Judgment, *supra* note 21, ¶¶ 417–37.

¹⁷² *Id.* ¶¶ 473–74.

¹⁷³ *Id.* ¶ 475.

¹⁷⁴ *Id.* ¶ 477.

¹⁷⁵ *Id.* ¶ 480.

¹⁷⁶ *Id.*

Justice Shireen Avis Fisher submitted a *Concurring Opinion on Aiding and Abetting Liability* to the SCSL Appeals Chamber's Judgment in *Taylor*.¹⁷⁷ In addition to concurring with the majority's decision, Justice Fisher noted that the defense's argument that the aiding and abetting standard was "so broad that it would in fact encompass actions that are . . . carried out by a great many States in relation to their assistance to rebel groups or to governments that are well known to be engaging in crimes of varying degrees of frequency"¹⁷⁸ She further noted the defense argument that such assistance "is going on in many other countries that are supported in some cases by the very sponsors of this Court" was very troublesome.¹⁷⁹ Justice Fisher concluded that the suggestion that the SCSL would "change the law or fashion or decisions in the interests of States that provide support for this or any international court is an affront to international criminal law and the judges who serve it."¹⁸⁰ Justice Fisher went on to state that judges "do not decide hypothetical cases," but instead "look to the individual case before them and apply the law as they are convinced it exists to the facts that have been reasonably found."¹⁸¹

2. The Šainović, et al. Case

The ICTY Appeals Chamber in *Prosecutor v. Šainović, et al.* also held that specific direction was not an element of aiding and abetting.¹⁸² The Šainović ICTY Trial Chamber convicted one of the defendants, Vladimir Lazarević, the Commander of the Priština Corps of the VJ, of aiding and abetting the crimes of deportation and forcible transfer of Albanians in Kosovo committed by the VJ in 1999.¹⁸³ On appeal, Lazarević argued that the

¹⁷⁷ *Prosecutor v. Taylor*, Case No. SCSL-03—01-A, Appellate Judgment Concurrence (Special Court for Sierra Leone Sept. 26, 2012) [hereinafter *Taylor Appellate Judgment Concurrence*].

¹⁷⁸ *Id.* ¶ 716.

¹⁷⁹ *Id.* ¶ 717.

¹⁸⁰ *Id.* ¶ 716.

¹⁸¹ *Id.* ¶ 717.

¹⁸² *Prosecutor v. Šainović, et al.*, Case No. IT-05-87-A, Appeals Chamber Judgment, ¶¶ 1650–51 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) [hereinafter *Šainović Appeals Judgment*].

¹⁸³ *Prosecutor v. Šainović, et al.*, Case No. IT-05-87, Trial Chamber Judgment, ¶¶ 8, 921–31 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) [hereinafter *Šainović TC Judgment*]. It should be noted that another accused in this case, Dragoljub Ojdanić, was also convicted of aiding and abetting; he dropped

ICTY Trial Chamber failed to determine whether or not his actions were specifically directed to assist in the deportation and forcible transfer, for which he was accused of aiding and abetting, and cited to the *Perišić* ICTY Appeals Chamber's decision regarding specific direction.¹⁸⁴ The *Šainović* ICTY Appeals Chamber held that the *Perišić* Appellate Judgment contradicted the "plain reading" of the *Mrkšić and Šljivančanin* Appellate Judgment, which found that specific direction is not a required element of aiding and abetting, and the *Lukić and Lukić* Appellate Judgment, which concurred with the *Mrkšić and Šljivančanin* Appellate Judgment.¹⁸⁵

The *Šainović* ICTY Appeals Chamber determined that due to the conflicting opinions, it was obliged to determine which precedent to follow.¹⁸⁶ It found that the *Tadić* Appellate Judgment focused on joint criminal enterprise and did not engage in a thorough analysis of aiding and abetting and that the *Perišić* ICTY Appeals Chamber relied upon the "flawed premise that the *Tadić* Appeal Judgment established a precedent with respect to specific direction."¹⁸⁷ Moreover, while some ICTY Appeals Chamber decisions have repeated the *Tadić* language regarding specific direction verbatim, others have not mentioned it as an element—or have even rejected it outright.¹⁸⁸ The *Šainović* ICTY Appeals Chamber also reviewed post–World War II cases and international instruments and found that none required a specific direction element.¹⁸⁹ As such, the *Šainović* ICTY Appeals Chamber determined that it would follow the *Mrkšić and Šljivančanin* and *Lukić and Lukić* precedents, as opposed to the *Perišić* precedent, and found that specific direction is not a required element of the aiding and abetting *actus reus*.¹⁹⁰

his appeal, however, and the Office of the Prosecutor dropped its appeal against some of his acquittals prior to the appeals hearing.

¹⁸⁴ *Šainović* Appeals Judgment, *supra* note 182, ¶ 1617.

¹⁸⁵ *Id.* ¶ 1621.

¹⁸⁶ *Id.* ¶ 1622.

¹⁸⁷ *Id.* ¶ 1623.

¹⁸⁸ *Id.* ¶¶ 1623–26.

¹⁸⁹ *Id.* ¶¶ 1627–42, 1647–49.

¹⁹⁰ *Id.* ¶¶ 1650–51.

V. THE ELEMENT OF SPECIFIC DIRECTION SHOULD EITHER BE
REJECTED OR MODIFIED TO EXPLICITLY INCLUDE A
"REASONABLE PERSON" STANDARD

This article suggests that tribunals in the future either follow the precedents set in *Charles Taylor* and *Šainović*, wherein "specific direction" is rejected as a required element of an aiding and abetting actus reus, or explicitly incorporate a "reasonable person" standard into the aiding and abetting criteria.

A. The Arguments for Rejecting "Specific Direction" as an Element of Aiding and Abetting

As the above discussion of the evolution of the international criminal law standard for aiding and abetting demonstrates, "specific direction" has often been mentioned in passing, but has not been a required element of the aiding and abetting actus reus.

In the excerpted post–World War II tribunal cases, not only is "specific direction" not required, it is not mentioned. In the *Zyklon B Case*, the evidence demonstrated that T&S contracted to sell Zyklon B to the Nazi SS for its intended purpose—extermination of vermin such as lice and rats.¹⁹¹ The prosecution argued that later in the sales relationship, Tesch and others became aware that the SS was using the product to exterminate humans, which was not its intended purpose and not why T&S agreed to sell, or continued to sell, it to the SS.¹⁹² Therefore, the sale of Zyklon B was not specifically directed to facilitate the crimes of the SS.¹⁹³ The fact, however, that Tesch and others became aware of its actual use and continued to sell it to the SS was sufficient to prove that they were guilty of aiding and abetting the SS of committing crimes against humanity.¹⁹⁴

Similarly, in the *Dachau Concentration Camp Case*, the prosecution had to prove "(1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, [and] (3) that each accused, by his conduct 'encouraged, aided and

¹⁹¹ Zyklon B, *supra* note 10, ¶ 93.

¹⁹² *Id.* ¶¶ 93–94, 101.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

abetted or participated' in enforcing this system."¹⁹⁵ The aiding and abetting *actus reus* standard set forth in this case does not state that the defendants must have specifically directed their actions to assisting the crimes committed in the camp.¹⁹⁶ The standard simply states that, by their actions, the crimes were participated in, encouraged, or aided and abetted.¹⁹⁷

As discussed above, the *Tadić* Trial Chamber followed the aiding and abetting standard set forth and developed by the post-World War II tribunals.¹⁹⁸ The *Tadić* Appeals Chamber used the phrase "specific direction" in an attempt to differentiate between the aiding and abetting and joint criminal enterprise standards. The Court did not define or discuss specific direction. Several cases thereafter use the language "specific direction" without explanation and others reject the standard outright.¹⁹⁹

Arguably, the *Perišić* Appeals Chamber interprets the use of the phrase "specific direction," as used in the *Tadić* case, to mean more than the Appeals Chamber in *Tadić* intended. In an attempt to demonstrate consistency among the cases in application of the standard, the *Perišić* Appeals Chamber holds that certain cases did not discuss specific direction because the accused aider and abettor was present at, or proximate to, the facilitated crimes.²⁰⁰ The Court then fails to describe what qualifies as "proximate" or "remote" and simply states that such determinations are case specific. If the determination of whether or not specific direction applies hinges on remoteness, it would seem that courts would have endeavored to clarify what qualifies as "remote." Furthermore, considering modern telecommunications technology, it is unclear why remoteness should be a factor at all since military commanders who are thousands of miles away can be kept apprised of happenings on the ground in real time.

¹⁹⁵ Dachau, *supra* note 19, at 13. It should be noted that at the ICTY, this type of case would typically be treated as a "JCE II" case. For a more in-depth discussion of JCE II, see ICTY Digest, *supra* note 48.

¹⁹⁶ *Id.* at 8, 13.

¹⁹⁷ *Id.*

¹⁹⁸ *Tadić* TC Judgment, *supra* note 25, ¶ 688.

¹⁹⁹ See footnotes 59, 62, 66, and 69.

²⁰⁰ Arguably, the *Perišić* Appeals Judgment incorporates the Kuprešić Appeals Judgment's discussion regarding temporal distance, but there is no discussion or citation regarding geographic distance.

Multiple judgments, including from the Appeals Chamber itself, have now confirmed that the *Perišić* Appeals Chamber's decision, holding that specific direction is, and has been, a required element of the aiding and abetting actus reus, was incorrect. The Appeals Chambers in the *Charles Taylor* and *Šainović* cases wrote lengthy opinions on the issue of "specific direction," analyzing the history of the aiding and abetting standard in the post-World War II era, and determined that "specific direction" is not an element of aiding and abetting.²⁰¹ If the weight of the post-World War II jurisprudence demonstrates that "specific direction" is not a required element, future international tribunals that consider this issue should explicitly state that "specific direction" is not required and that the standard should be rejected.

B. The Arguments for Incorporating a "Reasonable Person" Standard into Aiding and Abetting

Alternatively, there does appear to be some concern that if "specific direction" is not a required element of aiding and abetting, aiding and abetting will be applied in an overbroad way. The concern would be that governments or groups that have conducted extensive, reasonable due diligence regarding the act of providing arms to certain governments, militaries, or groups, in an attempt to ensure that those weapons are not used for war crimes, could be found guilty for aiding and abetting if some of those weapons are in fact used to commit war crimes.²⁰²

While the cases discussed above have either fully endorsed or rejected the specific direction element, to the extent a court wishes to engage in norm-building jurisprudential analysis, a middle ground approach may be preferable. Part of the aiding and abetting analysis should be whether the actor that provided arms or assistance did in fact conduct *reasonable due diligence* before providing such arms or assistance because, ultimately, it is reasonable behavior one wants to encourage. Command responsibility incorporates just such a reasonable person standard by requiring superiors to take "necessary and reasonable"

²⁰¹ Tadić Appeals Judgment, *supra* note 21, ¶¶ 417–37; Šainović TC Judgment, *supra* note 182, ¶¶ 1627–42, 1647–49.

²⁰² See, e.g., Perišić Appeals Hearing Transcript, *supra* note 167, at 62, ll. 5–12.

measures to “prevent” or “punish” the commission of crimes by their subordinates.²⁰³

If evidence exists that the actor providing arms or assistance, for example, substantially researched who would be receiving such arms or assistance, what the recipients intended to do with the provisions, what the recipients actually did with the provisions, and stopped providing arms or assistance if it became apparent that the recipient, or subgroups of the recipient, were utilizing the provisions to commit war crimes, crimes against humanity, or genocide, then there should be no criminal responsibility for aiding and abetting. But, if there is evidence that no such due diligence was conducted, that the provider knew that the provisions were being used for nefarious purposes, that the provider did nothing to discourage or stop such actions, or that the provider continued to supply the offending recipients with arms or assistance, then responsibility should follow. One must be able to differentiate between providing legitimate military assistance where some arms, despite due diligence, end up falling into the hands of one faction that uses them to commit crimes, and aiding a genocidal operation, where one already has knowledge that the group being aided is committing war crimes. Perhaps an overabundance of concern about the former led to the standard for aiding and abetting being so altered in *Perišić* as to make it all but useless.

If a “reasonable person” due diligence standard were explicitly set forth by the ICTY or other tribunals, actors would know how to conduct themselves in a way that would not subject them to criminal responsibility. If such were the case, those same actors would not be hesitant to provide arms and assistance to legitimate recipients. The goal of international justice is not to discourage governments and other actors from assisting worthy groups or from participating in legitimate humanitarian interventions or peacekeeping operations. Rather, the goal of international criminal justice is to hold actors accountable who knowingly participate, either directly or indirectly, in the commission of war crimes, genocide, or crimes against humanity.

²⁰³ See, e.g., ICTY Digest, *supra* note 48, 484–90 (describing what is required to satisfy as “reasonable” measures by a superior, depending on the superior’s level of authority).

CONCLUSION

The ICTY has contributed greatly to the development of international criminal law and ending impunity for the worst crimes committed in the former Yugoslavia. It has created legal precedent for international and domestic courts prosecuting genocide, crimes against humanity, or war crimes, and produced a sound legacy. Unfortunately, the stringent requirement of a specific direction element reverses some of the ICTY's positive momentum by increasing the likelihood that culpable individuals will be acquitted because the standard is so difficult to meet. Courts considering similar situations now, or in the future, should either reject the "specific direction" standard, or set forth a standard that explicitly incorporates a "reasonable person" due diligence standard. Doing so would ensure that governments and other actors can provide legitimate assistance to other governments and actors without risking criminal responsibility, and without knowingly encouraging or assisting crimes.